United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

No. 76-1282

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

LOUIS C. OSTRER,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of the Defendant-Appellant.

ALAN DERSHOWITZ,
Harvard Law School,
Faculty Office Building,
Cambridge, Massachusetts 02138.
(617) 495-4617

HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.
(617) 723-2624

UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
DANIEL FUSARO, CLERK
SECOND CIRCUIT

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

MISCELLANEOUS.

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

LOUIS C. OSTRER,
DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of the Defendant-Appellant.

Issues Presented for Review.

I. Whether a new trial is required where (a) there has been concededly unlawful Government overhearing of lawyer-client legal strategy discussions; (b) some of the information overheard in these discussions has concededly been communicated to the Assistant United States Attorney who tried the case; and (c) there was a significant opportunity for the Defendant to have been prejudiced by the overhearing and communications.

II. Whether the Defendant, in any event, proved actual and substantial prejudice, notwithstanding that his effort to prove his case was hampered by the failure of the Government to maintain and preserve critical notes and memoranda.

III. Whether, to the extent that the Defendant might be seen as having failed to sustain the burden of proof imposed on him by the Court below, major fault for this failure must be attributed to the Government's failure to provide, or the loss of, critical notes and memoranda.

Statement of the Case.

Introductory Statement.

This appeal raises a recurring and important constitutional issue, in the context of a largely uncontested factual setting. The trial court found, *inter alia*, the following facts: facts:

1. "On October 25, 1972, while Ostrer was awaiting trial under this indictment," New York City Police Officers assigned to the New York County District Attorney's Office conducted an electronic surveillance — "using bugging and telephone wiretapping devices" — of Louis Ostrer's business premises. This surveillance continued throughout the trial preparation and actual Federal trial of Ostrer (App. 678-679).

2. "It has been stipulated for purposes of this motion [and, of course, this appeal] that this surveillance conducted by state law enforcement authorities was in violation of Ostrer's Fourth Amendment rights. [T]he constitutional invalidity of this eavesdropping is not in dispute . . ." (App. 702).

3. During the course of this unconstitutional surveillance, the District Attorney's office overheard repeated discussions concerning "the impending federal trial . . ." (App. 680). "Among the more significant topics discussed were, (1) whether Ostrer should seek a trial severance from his co-defendant John Dioguardi; (2) whether Ostrer should waive his right to a jury trial and testify in his own behalf; (3) the likely impact of Ostrer's testimony, considered in light of disclosure on cross-examination of his prior state felony conviction as impeachment; and (4) the tactical value of having Ostrer introduce certain cancelled checks. Also mentioned was the name of Ostrer's private investigator, one James Lynch, formerly of the Federal Bureau of Investigation. None of the conversations were with Maurice Edelbaum, Esq., then Ostrer's counsel of record in the federal case, but at times the conversations included discussion by others with Ostrer of Mr. Edelbaum's comments and advice."

4. During the course of the unconstitutional surveillance, the District Attorney's office overheard the giving of "legal counsel"[1] to Ostrer by one of his attorneys, Julius November.[2] This legal counsel related directly to the pending federal indictment and forthcoming federal trial and covered, *inter alia*, how to deal with a potential government witness at the trial (App. 682-683).

5. The Government has formally conceded on the record that the overheard conversations were such that "[h]ad all of the information which was intercepted over the wire been communicated to a Federal prosecutor, I would say there had been some unconstitutional interception of defense communications." The trial judge seemed to agree that a new trial would be required had all the intercepted information been communicated to the Federal prosecutor.[3]

6. The trial court made the following critical finding: "we have found [that Assistant District Attorney] Fine did transmit information to [Assistant United States Attorney] McGuire that he derived from the eavesdropping on Ostrer's conversations . . ." (App. 703). Moreover, the "information" that Fine transmitted to McGuire concededly was derived directly from "legal counsel" given by Ostrer's attorney, Julius November, to Ostrer concerning the strategy toward a prospective Government witness at the Federal trial (App. 694).

Accordingly the record of this case contains uncontested facts giving rise to a classic Sixth Amendment intrusion into the lawyer-client communications involving a Federal criminal

---

[1] "We are persuaded that during the course of pre-trial preparation, Ostrer reasonably believed that November was extending legal counsel, rather than friendly advice. The testimonial privilege against disclosure of attorney-client communication is applicable where the client entertains good faith belief (even if erroneous) that the person consulted is a lawyer, *and* is acting as such on his behalf." (App. 682; emphasis in original.)

[2] "We therefore conclude that, for purposes of this motion, November was acting as an attorney for Ostrer" (App. 682).

[3] "If everything which the D.A.'s policemen did record or could have recorded which occurred in Ostrer's office prior to verdict had been transmitted fully and immediately to [Assistant United States Attorney] McGuire, our view of this motion would be different" (App. 707).

defendant.[4] All of the elements of such an intrusion have been conceded by the Government and found by the trial court. Yet the motion for a new trial was denied. The reasons given by the trial court for denying the new trial came down, in essence, to these: Although it is surely *possible* that Ostrer may have been prejudiced at his Federal trial, Ostrer did not satisfy the District Court's extremely high burden of factually demonstrating specific and documentable prejudice. Moreover, although it is undisputed that the Federal prosecutor received information that he never would have received but for the unconstitutional intrusion into Ostrer's lawyer-client communications, there is no evidence — the trial court concluded — of bad faith on the part of Government officials. The District Court held that, without a showing of bad faith on the part of the Federal Government, the Defendant must make an evidentiary showing of specific prejudice.

It is Appellant's contention on this appeal that the trial court — by its all or nothing approach to bad faith and prejudice — misapplied the governing law. If the lower court's decision is affirmed in the face of this record, it will be the first time — to Appellant's knowledge — that a Court of Appeals will have sustained a conviction where (a) it is conceded that governmental agents unlawfully overheard confidential legal strategy discussions between a Federal criminal defendant and one of his lawyers relating to his pending criminal case; (b) it is conceded that some of the overheard information was communicated to the Federal prosecutor trying the case; and (c) there was ample opportunity for the defendant to have been prejudiced by this conceded overhearing and communication. Moreover, even if this Court were to hold that a showing of specific actual prejudice is required in this context — thus becoming the first Circuit so to hold — the record of this case plainly establishes that Appellant was specifically prejudiced in several discernible ways by the overhearing and communication of his defense strategy. Finally, even if this Court holds that Appel-

[4] The violation is, of course, not limited to the Sixth Amendment; the wiretap was also concededly in violation of the Fourth Amendment, as well as of the Federal and state wiretap statutes.

lant has not been able to make a sufficiently specific showing of actual prejudice, the record establishes that he has been prevented from doing so by the inexcusable disappearance of two critical documents that had been in the possession of Government officials, and that were lost as a direct result of the Assistant United States Attorney's deliberate failure to notify the Defendant or the Court when he admittedly learned that he had earlier received information unlawfully overheard by an electronic surveillance of lawyer-client strategy discussions.

Proceedings Below.

Louis Ostrer was charged in a forty-count indictment with violations of certain provisions of the Federal securities law, mail fraud and conspiracy. The Trial Court ordered acquittals on twenty-three counts. The jury acquitted Ostrer on six counts and convicted him on eleven. Between trial and sentence, and within the period prescribed by Rule 33, F.R.Cr.P., Ostrer filed a new trial motion on the ground that an unsolicited post-conviction letter from one of the jurors to one of the defendants indicated that the juror was unfit for jury duty, thereby depriving the defendant of his right to a jury of twelve persons of sound mind, in violation of 28 U.S.C. § 1865(b)(4). The motion was denied, by the Trial Court, and the conviction was subsequently affirmed on appeal by a divided Court *sub nom. United States* v. *Dioguardi*, 492 F. 2d 70 (2d Cir. 1974), cert. denied, 419 U.S. 829 (1974).

Subsequently, Ostrer learned that, prior to and during his Federal trial, his office telephone and premises were unlawfully being monitored by agents operating out of the Office of the District Attorney for New York County, by means of both a telephone wiretap and an electronic eavesdropping device ("bug") that picked up every telephone conversation and indeed every word spoken in the room. Because Ostrer had had innumerable legal strategy and related discussions with his lawyers and with others on those very telephones and in his office premises,[5] Ostrer had reason to believe that such discus-

[5] See Judge Brieant's thumbnail sketch of the topics discussed at App. 680, 682, 684, 686.

sions must have been listened to and perhaps recorded by the District Attorney's surveillance unit. He filed this motion for a new trial, based upon what the Court below has found (App. 677-678) to be the newly discovered evidence of the wiretap and eavesdrop, and he asked for an evidentiary hearing to determine if his trial was in any way infected by Fourth and/or Sixth Amendment taint. Ostrer's Fourth Amendment claim was based upon the fact that the wiretap and eavesdrop had recently been declared unconstitutionally defective on Fourth Amendment grounds by a Justice of the Supreme Court for New York County (App. 702-703). The Sixth Amendment claim, based on overhearing of attorney-client conversations, of course, stands on its own feet regardless of the issue of whether or not the wiretap was constitutionally defective.

The Government's papers in response to the Defendant's motion, wherein the Government argued that an evidentiary hearing was not necessary, revealed for the first time several critical facts. First of all, the Government prosecutor in the stock manipulation case (hereinafter at times referred to as "the Belmont trial") admitted that he had communications prior to the Belmont trial with the Assistant District Attorney (John Fine) in charge of the wiretapping investigation, and that information gleaned from the wiretaps had been passed along to him. The Federal prosecutor, Harold F. McGuire, Jr., in his affidavit denied, however, that he was told or knew of the illegal source of the information; he also denied that any of the information he obtained from Fine was useful or used in the conduct of the Belmont trial. Secondly, McGuire's affidavits admitted that on April 18, 1973, several weeks after the conclusion of the Belmont trial, he nad a final meeting with Fine and learned both that the source of the information was a wiretap/eavesdrop device, and that the information conveyed to him by Fine prior to the Belmont trial was derived from a bugged conversation between Ostrer and his attorney. McGuire, until filing this affidavit in response to Ostrer's motion nearly two years later, had thus made no attempt to inform either the Court or Ostrer about these intrusions and communications.

An evidentiary hearing lasting three days was held before the Hon. Charles L. Brieant of the District Court. Judge Brieant, in a written opinion, denied the motion, although he did concede that "Ostrer's claims are colorable," that "the issues tendered arise in a sensitive area affecting the fundamental constitutional rights of persons charged with crimes" (App. 717), and that "we cannot say that this motion was in any sense frivolous" (App. 718). This appeal followed.

Opinion Below.

The opinion by the Honorable Charles L. Brieant of the United States District Court for the Southern District of New York is not yet reported and is reproduced in the Appendix, pages 675-718.

Facts.[*]

Louis Ostrer's business office in Manhattan was the subject of telephone wiretapping and electronic eavesdropping (sometimes referred to collectively as simply "the wiretapping") from October 24, 1972, until February 20, 1973. The wiretapping picked up his telephone conversations, and the eavesdropping picked up conversations in the room. This wiretapping covered the period prior to and during the entire duration of the Belmont trial.

On November 21, 1972, Louis Ostrer and his long-time attorney Julius November had a conversation on Ostrer's office premises. Ostrer and his attorneys were at the time preparing for the Belmont trial, and the November 21st conversation

---

[*] Some familiarity with the Belmont Franchising trial is assumed in view of the rather detailed exposition found in *United States* v. *Dioguardi*, 492 F. 2d 70 (2d Cir. 1974). It is only with this background in mind that certain of Ostrer's claims can be understood.

Furthermore, as an aid and convenience to the Court, a chronology of major dates and events involved in this appeal is contained in Addendum I to this brief.

concerned those preparations. Specifically, they were discussing the possibility that one Aubrey Moss, a one-time Ostrer business associate, might appear at the Belmont trial as a Government witness against Ostrer, since Moss had appeared to testify before the SEC and also had appeared before the Grand Jury that indicted Ostrer (App. 682-683, 694).

The text of the November 21st conversation is set out in a transcript of the eavesdrop tape that picked it up from start to finish (Ex. 81-99). While the contents of the conversation are not in dispute, there is a disagreement as to how to interpret it. More critically, there is a dispute as to whether the District Attorney's hearing this attorney-client conversation[7] and his subsequent communication of information derived therefrom to the Federal prosecutor ultimately affected the trial strategy of the Federal prosecutor in the Belmont case.[8]

The November 21st conversation between Ostrer and Attorney November can be understood only in light of the background of the relationship between Moss and one Susan Gold, who worked as a secretary in Ostrer's office. Gold and Moss had been having what was for Moss an extra-marital affair. During the course of his relationship with Gold, Moss had told

---

[7] The Court below found that there was an attorney-client relationship between Ostrer and November (App. 682).

[8] It was implicitly acknowledged at various times by the District Court that if the contents of the Ostrer-November conversation of November 21st had been transmitted to the Federal prosecutor, the new trial motion would have to be granted (App. 124-126). The prosecutor admitted that "there could [not] be too much dispute" that "had all of the information that was intercepted by the state been communicated to the Federal Government, there would indeed be a constitutional violation" (App. 116-117). Since this Ostrer-November conversation was one of the clearest strategy conversations intercepted, its transmission was obviously seen by all sides as crucial — if it was indeed transmitted to McGuire. The Government took the position that this conversation concerned plans to coerce a witness and thus was not privileged, but the District Court did not find it to be either unlawful or unprivileged.

her a number of exculpatory and favorable things about Ostrer.[9]

Gold had told all of this to Julius November, and November had her put some of it in a written statement that he had in his hand on the night of the critical November 21st bugged conversation with Ostrer (Ex. 82, 86-87). The tape of the bugged conversation reveals that November was aware, *inter alia*, that:

(a) Moss had a grudge against Ostrer, and Susan Gold knew this from Moss' own mouth.

(b) Moss had threatened to ruin Ostrer by testifying in the Belmont case.

(c) Moss was now denying that he had a grudge against Ostrer, but Gold knew that he was lying.

(d) Gold knew that the real reason Moss had cancelled a huge life insurance policy, written through Ostrer's agency, was his eagerness to demonstrate to the United States Attorney that he (Moss) was no longer on Ostrer's side and could be depended upon to testify against Ostrer.

(e) Ostrer had actually paid Moss back a good portion of Moss' losses in the Belmont collapse, and hence it was Ostrer, and not Moss, who ended up being swindled and ruined by the stock manipulation.

(f) Moss was a liar and a cheat, having lied for years to his wife and his mistresses.

(g) Susan Gold was available to take the stand, and no one could "get" to her to convince her to change or withhold testimony, since she had given November a signed statement.

(h) Most critically (as Fine learned from listening to this tape), the Federal Government "doesn't know this . . . , and they believe this guy [Moss] is a high, high responsible businessman" (Ex. 97).

---

[9] Susan Gold, on a bugged telephone conversation with Moss, summarizes to some extent some of the things that Moss had previously said about Ostrer, contrasts the derogatory things he was now saying about Ostrer, concludes that Moss had turned against Ostrer to save his own skin and was now revising his opinion of Ostrer in order to prepare himself to testify against his ex-friend, and accused Moss of being a liar (Ex. 104-117). Gold made it perfectly clear that she considered Moss to be a liar because what he was now saying conflicted directly with what he had previously told her.

During the course of the conversation, November revealed that he had gotten the written statement from Gold just in case Moss "gets to her" to try to get her to change her testimony. "Then you can use this, that she gave a statement" (Ex. 86-87).

From the context of the Ostrer-November conversation, it is clear that November contemplated several possible benefits that could be derived from having Susan Gold available as a defense witness. First of all, in the event Moss realized that she was available, he might try to get out of testifying altogether in order to avoid having it revealed that he had been having an affair.[10] On the other hand, if Moss decided to take the stand, Gold's availability as a witness might have the prophylactic effect of deterring Moss from lying about Ostrer and saying all kinds of derogatory things about him that would conflict directly with the things he had earlier told Gold about Ostrer, for Gold could then take the stand and show the jury what a liar Moss was, and why he was motivated to lie about Ostrer.[11] And final-

---

[10] Thus, November at one point said to Ostrer that if Moss learned that Gold was available as a witness, "I don't think he takes the stand . . . " (Ex. 98).

[11] "But you [Ostrer] yourself said it's a matter of record he [Moss] made a bundle right, he kept it didn't he. . . . He's [Moss] absolutely destroyed" (Ex. 88). Thus, Gold could testify that Moss told her that he made a profit in the Belmont deal, and was not a swindle victim of Ostrer at all. "So I said [to Gold] well I don't know about that but I do know that you would know if he made a big profit in the stock" (Ex. 92). "He [Moss] says that he was swindled; now here [in Gold's written statement] he swore to get you [Ostrer], right?" (Ex. 97.) Thus, Gold could testify as to Moss' venom against Ostrer. "[H]ere's a man who made a bundle and didn't give anything to the man he is now accusing, right, of stealing from him, and here's a man who again relinquished the stock to Ostrer" (Ex. 97-98). (This latter bit of conversation is November's reference to the fact that Gold knew that Ostrer, pursuant to his obligation to hold Moss harmless for his losses, turned over to Moss as collateral certain shares of his own stock, and got the stock back from Moss upon payment of the latter's losses. This would contradict Moss' claims of having been cheated and swindled by Ostrer, who lost a fortune in the Belmont collapse.) The references to Ostrer's indemnification of Moss, and of Moss' refusal to share his profit on earlier-sold shares with Ostrer, were all references, of course, to the terms of Moss' 50-50 deal to split profits with Ostrer in the Belmont deal, which will be discussed, *infra* at 35-40.

ly, of course, if Moss took the stand and told his lies about Ostrer, the defense would indeed put Gold on the stand to tell all, including how Moss was suddenly changing his tune about Ostrer, his motives, and the kind of man Moss really was.[12] He would have been, as November notes, destroyed as an effective prosecution witness.

Perhaps most important of all, however, the bugging tape picked up the fact that the Federal prosecutor was entirely unaware that Moss was such a flawed and dangerous witness for the Government.[13] The Government would, indeed, have been walking into a trap to put Moss on the stand.[14]

In addition to this critical Ostrer-November conversation, the wiretap picked up an enormous amount of discussion relating to legal strategy and bearing on such issues as (a) whether Ostrer would take the stand in his own defense (App. 680); (b) whom the Government would put on the stand (Ex. 87, 179); (c) whether Michael Hellerman would testify (Tape #A 3821); (d) how Aubrey Moss, should he testify, might be used to introduce evidence favorable to Ostrer (Ex. 72-77); (e) the name of Ostrer's investigator, James Lynch (App. 680); (f) the considerations militating in favor of Ostrer's being severed from co-defendant Dioguardi (App. 680); (g) the possibility of Ostrer's waiving a jury and then testifying in his own behalf (App. 680); (h) the evidentiary value of Ostrer's being able to produce at the trial cancelled certified checks in order to prove that certain stock was paid for (App. 608); (i) Ostrer's need at

---

[12] "Here the man is a whoremaster. He's been running around with women. . . . The jury, they will say, here's a man that is burnt up, right? Here's a man that is so low he is cheating on his wife; here's a man that took a single girl to Europe, a married man" (Ex. 97).

[13] "But now here the government doesn't know this, see. And they believe this guy is a high, high responsible businessman, right? He says that he was swindled; now here he swore [to Susan Gold] to get you, right? Here the man is a whoremaster. . . ." (Ex. 97.)

[14] The trap was even more dangerous for the Government, for in addition to destroying Moss as a Government witness, Ostrer's defense team had a plan for turning Moss into a potent defense witness by introducing through him certain evidence exculpatory to Ostrer. This is discussed *infra* at 35-40.

trial for certain documents to prove that he had repaid Moss for many of Moss' losses in the Belmont collapse (Ex. 78).[15]

On the very same day that the bugged Ostrer-November strategy conversation took place (namely November 21, 1972), Assistant United States Attorney McGuire interviewed at his office Aubrey Moss, in preparation for the latter's testimony at the Belmont trial. Coincidentally, the very next day, the wiretap picked up another conversation about Moss, in which Ostrer discussed Moss' grudge against him (Ex. 72-76).

In addition, sometime between November 24 and December 5, 1972, the wiretap picked up the fact that an investigator by the name of "Jim Lynch" was working for Ostrer in preparation for the Belmont case (App. 5).

As the Belmont trial approached, McGuire quickened his preparations. On November 30, 1972, at McGuire's behest, a subpoena was issued to secure Moss' appearance as a witness at the trial (Ex. 214). McGuire, who had read Moss' earlier SEC and grand jury testimony (App. 694; Ex. 125-156), and who interviewed Moss on November 21, 1972 (App. 694), put him on his witness list (App. 416).

Meanwhile, John Fine, upon hearing the Ostrer-November conversation of November 21st, approached his superior Mr. Scotti concerning contacting the United States Attorney's office in order to transmit to that office the fact that an "obstruction of justice" was being hatched by Ostrer and November to blackmail Moss. Mr. Scotti on December 21, 1972, spoke to Sylvio Mollo of the United States Attorney's office by telephone. Scotti told Mollo what the former described as the "substance" of the bugged Ostrer-November conversation (App. 369), and they arranged to have Fine meet

[15] The items recorded on tape represent the very *minimum* amount of material overheard by the District Attorney's office. Several monitoring agents testified that some items overheard but not recorded were summarized or mentioned in the "plant reports" that were made up to summarize overhearings (App. 143, 156, 243). And while the agents were instructed not to tape attorney-client conversations, they did record the Ostrer-November conversation (App. 154, 172). And, perhaps most important of all, Assistant District Attorney John Fine, who was in charge of the monitoring operation, testified that plant monitoring agents may well have conveyed information directly to him above and beyond what information he might have gotten from reading the plant reports and hearing the tapes (App. 312-313).

McGuire.[16] McGuire then phoned Fine to arrange such a meeting.

The critical Fine-McGuire meeting took place at Fine's office on December 22, 1972. It was attended as well by a number of Fine's agents who worked on the Ostrer surveillance. It is difficult to determine precisely what was communicated by whom at the meeting, because memories of the witnesses were admittedly dim, Fine had lost his notes of this critical meeting (App. 299-301), while McGuire testified that he did not take any notes (App. 398). McGuire admitted that November's name may have been disclosed by Fine (App. 385), and the Judge found that McGuire knew that November was an attorney (App. 26, 387). The Court below found that at this crucial December 22nd meeting,

> "Fine told McGuire, in substance, that Ostrer had certain information regarding Moss, and expressed his fear that this information would be used to effect an obstruction of justice."

(App. 693-694). Fine informed McGuire that a man named "Jim Lynch" was working as an investigator for Ostrer (App. 269, 394, 315-316, 695, 381), triggering in Fine and McGuire a concern lest this be the same Jim Lynch who used to or still did work for the F.B.I. and who could possibly constitute a security leak in the prosecutor's camp (App. 691-692, 323, 318). Finally, the Court below found that

> "McGuire told Fine that he [Fine] did not have to worry about an obstruction of justice, because it was not McGuire's *present* intention to call Moss as a witness, *at least, not as part of the Government's direct case.*" (Emphasis added.)

---

[16] The Court below found that "Scotti told Mr. Mollo that an Assistant District Attorney had information that would be of interest to the Assistant United States Attorney on the Ostrer case" (App. 693).

(App. 694). The court below found that Fine did not at the December 22nd meeting explicitly tell McGuire that the source of his information was a wiretap. McGuire, for his part, asked the source of Fine's information, but when he was told by Fine that this could not be revealed, he ceased to press the point (App. 389).[17]

The Court below concluded that the reason Fine refused to inform McGuire that the information came from a wiretap was because Fine wanted to preserve the secrecy of his investigation, and he "regarded the United States Courthouse as a leaky ship" (App. 691).[18] The Court below predicates a major leg of its findings and conclusions on Fine's desire to protect the secrecy of his electronic surveillance investigation, presumably because if that was not Fine's motive, then one must assume that he had a less benign motive for hiding from McGuire the source of his information. For example, he might have wanted to convey to McGuire the advice that McGuire should not use Moss as a witness at the Belmont trial because Moss was vulnerable, but he realized that he could not convey that information if he also told McGuire that he (Fine) learned it as a result of an interception of attorney-client conversations.

---

[17] In fact, the testimony leaves one with a distinct impression that McGuire suspected that electronic surveillance was the source of Fine's information. Det. O'Rourke, a member of the surveillance team who attended the Fine-McGuire meeting, testified that at the meeting, McGuire never "directly" asked the source of Fine's information (App. 269). He said that Fine told McGuire that he (Fine) did not even want to discuss the source (App. 269). Fine testified that McGuire at the meeting "may have" made an inquiry as to whether Fine's information came from a bug or a tape, and that McGuire "just wanted to find out what the source was . . ." (App. 330). Here, as elsewhere, McGuire appears to have tried to elicit as much information as possible without actually learning too much for comfort.

[18] It is significant that one of the reasons, according to the Court below, that Fine distrusted the security of the United States Attorney's office was his suspicion that Jim Lynch was at the same time an F.B.I. agent and an investigator for Ostrer. He learned about Lynch, of course, from the wiretap (App. 691-692). Assuming, then, that the Court below is correct in assuming that the knowledge of Lynch was a major factor preventing Fine from telling McGuire the source of his information, it is ironic that it was something illegally overheard (the fact of Jim Lynch) that prevented Fine from telling McGuire about the illegal source of his information about the Ostrer-November "coercion" plot.

The Court below also found that during this Fine-McGuire meeting, McGuire "asked whether Fine was in possession of any material that would be useful for the cross-examination of Ostrer." McGuire succeeded in obtaining from Fine, according to the Court, only "a certified copy of Ostrer's prior state judgment of conviction and the transcript of his pleas to those charges, both matters of public record" (App. 696).[19]

After this meeting with Fine, McGuire ordered that Moss be told to remain under subpoena during the duration of the trial (App. 696). Moss wrote to McGuire confirming that he considered himself still under subpoena on call, although he did not actually have to be in court until further notice (Ex. 123).

On December 29, 1972 — the eve of the Belmont trial — there was another communication between Fine and McGuire concerning the subject matter of the monitored lawyer-client conversation of November 21, 1972. Fine returned a phone call from McGuire, and they again discussed whether Moss had been subpoenaed for the trial. (App. 548-567; Ex. 169.)

On January 4, 1973, the jury was sworn, and on January 27th, after two and a half days of deliberations, a guilty verdict on eleven counts was returned. On February 20, 1973, the wiretap ended, and the next day Ostrer's office was raided pursuant to an unlawful state search warrant.

Finally, on April 18, 1973, a final meeting was held between McGuire and Fine, at which Fine revealed the source of his information, told McGuire about the wiretapping, and tried to convince McGuire to indict Ostrer and November for conspiracy to obstruct justice. McGuire claims that this was the first time that he learned that the information communicated to him by Fine at the December 22, 1972, meeting stemmed from an eavesdropping of an attorney-client conversation. McGuire did not, however, until after Ostrer's new trial motion was filed in December of 1974, undertake to inform either the Court or defense counsel of this fact.[20]

[19] During the evidentiary hearing, Judge Brieant appeared a bit skeptical, or perhaps perplexed, at why McGuire had to ask Fine for information that was a matter of public record and that McGuire could have obtained without bothering Fine at all, and that probably was not admissible anyway (App. 425-426). It is interesting to note that McGuire admitted being "interested in prying as much material" as he could from Fine about the investigation (App. 425).

[20] Had McGuire done so, defense counsel would have been able to raise sooner the issues on his motion for a new trial, and a vital piece of evidence might have been preserved that was ultimately lost as a result of the delay. See discussion at pp. 42-47, *infra*.

Argument.

I. A New Trial is Required where (A) There has been a Concededly Unlawful Government Overhearing of Lawyer-Client Legal Strategy Discussions; (B) Some of the Information Overheard in these Discussions ha Concededly been Communicated to the Assistant United States Attorney who Tried the Case; and (C) There was a Significant Opportunity for the Defendant to have been Prejudiced by this Overhearing and Communications.

In cases involving violations of the Sixth Amendment, the Supreme Court has never required a documentable showing of specific prejudice. The reason for this was stated in *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942), where the Court held that a determination of "the precise degree of prejudice sustained" would be "at once difficult and unnecessary." The right to counsel, the Court held, "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76. The Court did, however, require the defendant to show that there was *an opportunity for prejudice*, and it found that an infringement of the sort there at issue "may *conceivably* impair counsel's effectiveness" (emphasis added). *Id.* at 75.

This approach has characterized the decisions of the Supreme Court — and most lower courts — for at least three decades. Under this approach the courts will ask whether the *external circumstances* created *any opportunity for prejudice to have occurred.* If not, it will permit the conviction to stand. But if the external circumstances did create an opportunity for prejudice to have occurred, the court will not inquire further in an effort to determine whether specific prejudice can actually be proved.

This was the approach adopted in the leading cases involving governmental intrusion into lawyer-client discussions. In *Coplon* v. *United States*, 191 F. 2d 749 (D.C. Cir. 1951), the defendant alleged that telephone conversations between herself and her attorney were overheard; the trial court held

that this allegation, if true, would not require a new trial unless there was also an actual showing of prejudice. The Court of Appeals reversed, citing *Glasser* v. *United States*, *supra*, and holding that "the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred . . . regardless of whether prejudice was shown to have resulted from the denial." *Id.* at 759. "[D]emonstrable prejudice," the court held, is not required to vindicate the right, since the opportunity for prejudice is so inherent when conversations between a defendant and her lawyer are overheard.

In *Caldwell* v. *United States*, 205 F. 2d 879 (D.C. Cir. 1953), the court followed *Coplon* in the context of a Government informant in the defense camp, holding that "*actual prejudice* [need not] be shown in order to entitle defendant to a new trial." (Emphasis added.) *Id.* at 881. Again, in that case as in *Glasser* and *Coplon*, the *opportunity* for prejudice was apparent, but a showing of *actual* prejudice would have been difficult, if not impossible to make.

In *Hoffa* v. *United States*, 385 U.S. 293 (1966), the Supreme Court assumed "that the *Coplon* and *Caldwell* cases were rightly decided . . . ," and it concluded that if the trial at which Partin's intrusion had occurred "had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective." 385 U.S. at 307. There, as in the previous cases, there had been no showing of actual prejudice, but testimony had been adduced suggesting the opportunity for prejudice (albeit of the most trivial sort).

In *Black* v. *United States*, 385 U.S. 26 (1966), the Supreme Court, in a factual context similar to the instant case, reversed the conviction and ordered a new trial without any showing of actual prejudice. The Court expressly considered — and rejected — a suggestion by the Government that the case be remanded for a hearing at which the issue of prejudice would

be explored. In the *Black* case, the Solicitor General had advised the Supreme Court that F.B.I. agents had installed a listening device in petitioner's hotel room "in a matter unrelated to this case." *Id.* at 27. The device picked up some exchanges between petitioner and his lawyer. The Solicitor General "was able to represent to the Court" — on the basis of a full investigation — that "none of the information so procured had been utilized in Black's aforesaid prosecution." 385 U.S. at 30. Indeed, it was not until well after the trial was over that the government lawyers in charge of the case first learned that any conversations between Black and his attorney had been overheard. (This, of course, is essentially what happened in the instant case, except that here it was the state rather than the F.B.I. that conducted the electronic surveillance in an "unrelated" matter.) The Solicitor General did tell the Court in *Black* that an opportunity for prejudice existed, since notes summarizing parts of the interrupted conversations were included in the material sent to the lawyers preparing the case. *Id.* at 28. (This too is essentially what happened here, except that the transmission in this case was oral rather than in writing, thus increasing the possibility that more was actually communicated than was recalled at the hearing.) The Solicitor General in *Black* suggested that the case be remanded to the District Court for a prejudice hearing, in which the "relevant materials would be produced and the court would determine, upon an adversary hearing, whether petitioner's conviction should stand." *Id.* at 28. The Court rejected the Solicitor General's suggestion. It held that since "the Tax Division attorneys did not know at the time of the trial that conversations between Black and his attorney were included in the transcriptions," *id.* at 28, a prejudice hearing would not suffice, and a new trial would have to be ordered. (This, of course, is precisely the situation here, since McGuire also "did not know at the time of the trial" that the content of unlawfully monitored lawyer-client legal strategy sessions "were included" in the communications.) Thus, the Court held, in no uncertain terms,

that since there was an *opportunity* for subtle — indeed unconscious — prejudice, the Government would be denied its request to show, at a hearing, that no *actual* prejudice occurred. Two justices dissented explicitly on the issue of prejudice.[11]

Black v. *United States* is dispositive of the case at bar. In that case actual prejudice was not demonstrated or apparently even *alleged* by the defendant. In *Black* there was written communication between the agents who overheard the intercepted conversations and the Government lawyers, but there was no dispute over the conclusion that "none of the information so procured had been utilized in Black's aforesaid prosecution." 385 U.S. at 30. Here that conclusion is very much in dispute: it is Appellant Ostrer's vigorous contention that matters overheard during the unlawful monitoring of his legal strategy discussions with his attorney were, in fact, "utilized" in his prosecution. Certainly the state of the record — especially in light of the absence of written records of the critical meetings — does not exclude the possibility that the Federal prosecutor may have learned, for example, that Ostrer had decided not to take the witness stand at his trial. It is, of course, conceded that the Federal prosecutor did learn that Ostrer had something on a potential Government witness. In the case at bar, therefore, the opportunity for prejudice was surely at least as great as in *Black*. Moreover, in *Black* it would at least have been possible to determine whether actual prejudice had occurred, since reports and memoranda "had been made" of all the material sent to the Government lawyers. These reports and memoranda — which were the *only* vehicle of communication between those who overheard the conversations and the Government lawyers — "were available." They could have been examined to determine precisely what information was communicated to the Government lawyer. In this case, on the other hand,

[11] The dissenting justices agreed that the petitioner was entitled to a "full-scale development of the facts" but argued that absent a showing of prejudice the conviction should stand. They recognized that the "basis" for the Court's decision "is that any governmental activity of the kind here in question *automatically* vitiates, so as at least to require a new trial, any conviction occuring during the span of such activity." *Id.* at 31. (Emphasis in original.)

although at least one memorandum was made, it has mysteriously disappeared from the District Attorney's file. Accordingly, it can never be known with any degree of certainty what information was communicated by Fine and the policemen to Assistant United States Attorney McGuire. Thus, the *opportunity for prejudice* was at least as great in this case as in *Black*; but *the opportunity to demonstrate actual prejudice* is considerably less available in this case — as the direct result of the unlawful wiretapper's failure to preserve his records. (See discussion *infra* at pp. 42-47.) Accordingly, the case at bar is a far more compelling one than was *Black* for the application of the rule requiring a new trial without an actual showing of prejudice.

The Supreme Court's decision in *O'Brien* v. *United States*, 386 U.S. 345 (1967), decided a year after *Black*, is even more compellingly dispositive against the lower court's requirement of actual prejudice. In that case the Solicitor General disclosed that the F.B.I., while tapping someone else's phone, had overheard a single isolated statement of the defendant to one of his lawyers, requesting the lawyer "to file an application relating to the territorial conditions of his release on bail."[22] Government's brief at p. 11. This conversation was noted in the logs of the monitoring agents but *was not communicated* "to attorneys for the Department of Justice, including those who prosecuted this case." *Id.* at 11. Indeed, it was "not communicated in any manner outside the F.B.I." *Ibid.* The Solicitor General argued, therefore, that since "no evidence introduced at the trial was tainted in any manner by leads obtained from the overheard conversations," the case should not be remanded for a new trial. *Id.* at 11-12. However, the Supreme Court — citing *Black* v. *United States, supra* — reversed the conviction and ordered a new trial, despite petitioner's implicit acknowledgement that

---

[22] "The attorney's words were not overheard." Government's brief at p. 11. (Here, of course, they were.) The F.B.I. also overheard a conversation between O'Brien and the owner of the premises who was the subject of the eavesdropping. That communication, which was of course not protected by the Sixth Amendment, was never communicated to government lawyers. *Id.* at 11.

no actual prejudice could be demonstrated. (See petitioners' reply brief in *O'Brien* at pp. 5-6.)[23]

In *O'Brien*, there had not even been any direct communication between those who ove heard the conversation and the Government lawyers. Yet the Court reversed without any finding, or even allegation, of prejudice. In this case there was, of course, admitted communication between Fine and McGuire. There is, to be sure, a dispute over precisely how much was communicated and the exact effect this communication had on McGuire's trial strategy. But there is no dispute about the fact that communication concerning the Ostrer case did occur and that the opportunity for prejudicial communication did exist. This then is a far more compelling case for reversal than *O'Brien*. Indeed, there is no principled way of distinguishing the instant case from *O'Brien* or *Black*.

This Circuit has never departed from the principle that when there has been an unlawful intrusion into the defendant's relationship with his lawyer, and information obtained from that intrusion was communicated to the trial prosecutor, no showing of actual prejudice need be made, so long as there was an opportunity for prejudice. In *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626 (2d Cir. 1955), cert. denied, 349 U.S. 968 (1955), the defendants alleged that a police officer "was 'planted' in a seat reserved for spectators at the trial to overhear private and privileged communications between the parties and their attorneys during the course of the trial." *Id.* at 628. The defendants made no allegation that they could show actual prejudice. The Court of Appeals said that:

> "If the allegation, *without more*, is supported by evidence which will justify such a finding, then petitioners' fundamental rights have been denied. *That such action resulted in no prejudice to the accused does not void or excuse the violation.* Glasser v. U.S., 315 U.S. 60 . . .;

[23] The two dissenting judges characterized the material overheard by the F.B.I. as "peripheral, totally insignificant, and uncommunicated eavesdropping." 386 U.S. at 347.

> Coplon v. U.S., . . . 191 F. 2d 749, certiorari denied 342 U.S. 926 . . .; Caldwell v. U.S., . . . 205 F. 2d 879; Rusco v. Moses, 304 N.Y. 424." 221 F. 2d at 628 (emphasis added).

The entire panel of the Court — Judges Medina, Frank and Brennan — agreed that no actual prejudice need be shown for a new trial. They concluded, however, that no violation of the right to counsel had occurred because the defense attorney had "recognized Rubin as a police officer, noticed where he sat and attached no significance to his presence." *Id.* at 629. Judge Frank concurred on the ground that defendants have no right to assume that discussions "not in private" would not be overheard by those in close proximity. He agreed, however, that had there been an intrusion, the *Caldwell* and *Coplon* cases would require reversal without a showing of actual prejudice. These authorities, he observed, "establish a salutary prophylactic rule. It relieves the defendant of a practically impossible burden of proving that the unconstitutional conduct worked actual harm to him." *Id.* at 631. See also *United States* v. *Lebron*, 222 F. 2d 531 (2d Cir. 1955) (the court assumed that where an unconstitutional intrusion occurs "the defendant is entitled to a new trial without any proof by him that the intrusion harmed defendant, *even if the intrusion was prompted by the highest motives.*" *Id.* at 534.). (Emphasis added.)

This Court's recent decisions in *United States* v. *Mosca*, 475 F. 2d 1052 (1973); *United States* v. *Arroyo*, 494 F. 2d 1316 (1974); *United States* v. *Rosner*, 485 F. 2d 1213 (1973), and *United States* v. *Gartner*, 518 F. 2d 633 (1975), fit squarely into this line of cases and do not support a requirement that actual prejudice need be shown in a case where there has been an unlawful intrusion into the lawyer-client relationship, where information obtained by that intrusion has been communicated to the trial prosecutor and where the opportunity for prejudice exists.

In the *Mosca* case a government informant "participated as a defendant in two pre-trial conferences" held in the presence of the trial judge and the prosecutor. 475 F. 2d at 1060. These conferences were not, of course, private or privileged.

In affirming the conviction, the Court of Appeals did not adopt a requirement that *actual* prejudice must be shown. To the contrary, it cited the line of cases holding that no actual prejudice need be shown so long as there was an opportunity for prejudice. (The Court cited *Caldwell*, *Coplon*, *Hoffa* and *Cooper*.) The Court did say that "[p]rejudice to appellants *must be considered*." *Id.* at 1061 (emphasis added). This is precisely what *Caldwell*, *Coplon*, *Hoffa*, *Black*, *O'Brien*, *Cooper* and *Lebron* concluded. Prejudice must indeed be considered: if there was any realistic opportunity for prejudice to have occurred, the conviction must be reversed without imposing on the defendant the "impossible burden" of proving that specific prejudice actually occurred. *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626, at 631 (Frank, J., concurring). But if the court finds -- as it of course did in *Mosca* — that there was no conceivable opportunity for any possible prejudice to have occurred, then the conviction will not be reversed.

In *Rosner*, the court simply held that no unlawful intrusion into the lawyer-client relationship had occurred. 485 F. 2d at 1224.[24] See also *United States* v. *Arroyo*, *supra*, at 1323 (no violation of Sixth Amendment rights; finding of fact that no material was "passed on to any member of the prosecution team"), *United States* v. *Gartner*, 518 F. 2d 633, 637 (2d Cir. 1975) ("we find no actual intrusion upon the confidential attorney-client relationship. . . .") The court also pointed out that "no trial strategy was discussed. . . ." (Here, of course, it is conceded that an actual intrusion *did* occur and that trial strategy *was* discussed.)

This Circuit has never, to our knowledge, departed from its acceptance of the rule — mandated by the decisions of the Supreme Court in *Black*, *O'Brien* and *Hoffa* — that where agents of the Government have unlawfully overheard confidential conversations between a lawyer and his client and where

[24] "We do not lightly regard so serious a constitutional claim, for the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel. Glasser v. United States, 315 U.S. 60 . . . (1942). We conclude, however, that a finding of unlawful intrusion must precede the determination of its consequences. We can make no such finding here." 485 F. 2d at 1224.

some of the information derived from these conversations has been turned over to the trial prosecutor under circumstances where an opportunity for prejudice exists, a new trial will be ordered without requiring the defendant to demonstrate actual prejudice. The lower court decision is, to our knowledge, the first holding by any court in this Circuit that a new trial is not required even where (a) there was a concededly unlawful governmental overhearing of confidential communications between a Federal criminal defendant and his attorney; and (b) some of the information overheard in that unlawful electronic surveillance was communicated to the Assistant United States Attorney actually trying the case.[25]

The Government is thus requesting this Court to abandon — for the first time — the "salutary rule"[26] requiring a new trial when an opportunity for prejudice was created by an intrusion into a defendant's confidential relationship with his attorney. This Court should not abandon that rule — a rule that has been rigorously followed in other Circuits.

In *United States* v. *Zarzour*, 432 F. 2d 1 (5th Cir. 1970), appellant alleged that a private investigator hired by his lawyer was also a paid confidential informer for the F.B.I. who had — in the words of the court — "served the government in other matters." *Id.* at 3. At a hearing it was established that the informer did not give *"any information"* to the prosecution or the F.B.I. concerning appellant Zarzour. (That is in sharp contrast to the undisputed fact in this case that Fine did give McGuire certain information about Ostrer's trial strategy.) It was also established at the hearing that there were "written memoranda in the files" concerning the informer's contacts with the Government. (That too is in sharp contrast to the undisputed fact in this case that the Assistant District Attorney neglected to preserve his written

---

[25] Cf. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562 (2d Cir. 1973). (The court announced and applied "a strict prophylactic rule to prevent *any possibility, however slight,* that confidential information acquired from a client during a previous relationship *may* subsequently be used to the client's disadvantage." *Id.* at 571 (emphasis added).)

[26] *United States ex rel. Cooper* v. *Denno, supra,* at p. 631 (Frank, J., concurring).

record of his communication with McGuire.) On the state of that record, the Court of Appeals ordered a "reversal and remand." *Id.* at 4. It sent the case back to the District Court with instructions to examine "all written memoranda in the files. . . ." And it held that "a new trial" would be required if "it . . . is learned that *information concerning appellant's case* was transmitted to the prosecution so as to violate his Sixth Amendment rights." *Id.* at 4-5 (emphasis added). The court did not require that the transmitted information be of any particular significance to the Government's case or that the transmission had to actually have prejudiced appellant. Indeed, the very finding for which the court in *Zarzour* remanded *has already been made in this case*: there already has been a showing that Fine transmitted information to Federal Government lawyers concerning the *Ostrer* case. Thus, on the record of this case, the reasoning of the *Zarzour* court would have led to a reversal for a new trial.[17]

United States v. *Rispo*, 460 F. 2d 965 (3d Cir. 1972), also supports a new trial for *Ostrer*. In *Rispo*, one of the co-defendants was a Government informer. Appellants sought a

---

[17] *Gradsky* v. *United States*, 376 F. 2d 993 (5th Cir. 1967), makes it clear that the rule of automatic reversal, where the opportunity for prejudice exists, is followed by the Fifth Circuit, as the following quotation demonstrates:

> "After oral argument was heard by this court on remand from the Supreme Court, the appellee filed a motion to vacate the judgment as to appellant Levine and remand the cause as to him to the District Court *for a new trial.* It appears from the motion that the Federal Bureau of Investigation installed a microphone by trespass in a commercial establishment in which Levine may have had a proprietary interest and the Federal Bureau of Investigation overheard conversations of Levine with counsel relating to the charges. Levine was under indictment in this case and the trial on the indictment took place during the period of surveillance. *The motion must, of course, be granted.* Black v. United States, 1966, 385 U.S. 26, 87 S. Ct. 190, 17 L. Ed. 2d 26.
>
> . . . . . .
>
> *"The judgment against George Levine is vacated and the cause as to him is remanded to the District Court for a new trial."* (Emphasis added.) 376 F. 2d at 997.

new trial "regardless of whether information obtained by the informant was transmitted to the government." 460 F. 2d at 973. The Government argued that the intrusion "has not been shown to be prejudicial, thus requiring reversal." The Court of Appeals reversed the judgments of conviction and remanded for a new trial. In doing so, it adopted the precise approach proposed by appellant Ostrer in this case: it made a threshold inquiry as to whether any opportunity for prejudice existed; finding that such opportunity did exist, it declined to inquire further into whether there was actual prejudice. The court spoke of "the possibility of prejudice implicit in such a situation." It found that such a "possibility" existed despite the conclusion, required by the record in that case, that none of the information learned by the informant was "transmitted to the government." The court reasoned that the determination of whether the defendant was actually prejudiced "is incapable of realistic delineation." It construed the *Black-O'Brien* line of Supreme Court cases to require a new trial when "the *danger* posed by such intrusion was considered great enough . . .", without regard to whether prejudice could actually be shown. *Id.* at 977. Throughout its opinion, the *Rispo* court focused on *the opportunity for prejudice,*[18] and concluded that such opportunity plainly exists when a Government informant has intruded in any manner on a defendant's consultations with his attorney. The court found that, despite the evidence that the informant had never communicated any information obtained from these sessions to the Government, the "possibility of prejudice implicit in such a situation is unlimited. . . ." *Id.* at 976, n. 22.

The possibility of prejudice implicit in the *Ostrer* case is far greater than in *Rispo*. In *Rispo*, the defendant apparently conceded that no information obtained by the informant was transmitted to the government, see 460 F. 2d at 973; in *Ostrer*, the Government has conceded that information about the *Ostrer* case *was* transmitted to McGuire by Fine and that

[18] See, *e.g.*, pp. 970, 976, 977: "the *very real likelihood of prejudice*"; "the *possibility* of prejudice"; "the *danger* posed by such intrusion"; "*possible* . . . prejudice, *however remote*"; "*a realistic likelihood of possible* conflict of interest." (Emphasis added.)

this information was learned from unlawful electronic surveillance of legal strategy sessions between Ostrer and one of his lawyers. At the very least, it is clear that the pre-trial meeting between Fine, the policemen-wiretappers and McGuire provided ample opportunity for prejudice to have occurred, *e.g.*, for information learned from the illegal wiretaps to have been communicated — consciously or unconsciously, directly or indirectly — to the trial prosecutors. The opportunity for undetectable prejudice was magnified by Fine's failure to preserve his records of the meeting. Certainly, the "possibility of prejudice [is] implicit in such a situation." Indeed, it is far more implicit in the Ostrer situation — where communication concerning the case followed the unlawful overhearing of legal strategy sessions — than it was in the *Rispo* situation.[29]

Accordingly, if this Court were to require an actual showing of prejudice in this case, it would become — we believe — the first Circuit to depart from the rule requiring reversal where there was an actual governmental intrusion into lawyer-client

---

[29] The Fourth Circuit recently aligned itself with the holding in *Rispo* and stated — in the context of a § 1983 action — that it was simply "a waste of time" for a court to undertake the task of determining whether or not a particular Sixth Amendment intrusion was or was not "gross" and, thus, was or was not prejudicial error. *Bursey* v. *Weatherford*, 528 F. 2d 483, 486 (1975), cert. granted, U.S. , 96 S.Ct. 3165 (1976). This approach was recently taken by the United States Supreme Court in *Geders* v. *United States*, U.S. , 96 S. Ct. 1330 (1976), where the Court ruled that the Sixth Amendment was violated and a new trial was required when the trial court precluded the defendant from conferring with his attorney during a 17-hour overnight recess while the trial was on-going and when the defendant himself was on the witness stand. The Fifth Circuit had sustained the conviction on the grounds that the defendant had failed to claim or demonstrate any prejudice flowing from the denial of attorney-client consultation. *United States* v. *Fink*, 502 F. 2d 1 (1974), relying upon a similar ruling from the Second Circuit, *United States* v. *Leighton*, 386 F. 2d 822 (1967) ("We will not . . . reverse the conviction solely on this ground when we can discern no actual harm to the right to effective assistance of counsel, and are convinced that there was none," at 823). The refusal of the Supreme Court in *Geders* to engage in a search for "substantial," "real," or "actual" prejudice is an appropriate and realistic stance in the context of a defendant's claim of a Sixth Amendment violation, the prejudice from which may well not be "provable," but which is certainly possible and even, as in this case, quite likely.

legal strategy sessions, where at least some information learned as a result of that intrusion is communicated to the prosecutor trying the case, and where the opportunity for prejudice exists.[30] This would be neither good law nor good policy.

The underlying rationale of the rule requiring no actual showing of prejudice where the opportunity for prejudice exists is that there will often be cases where prejudice may well have occurred, but where it will be "difficult" to demonstrate such prejudice.[31] Accordingly, the defendant is "relieve[d]" of the "practically impossible burden of proving that the unconstitutional conduct worked actual harm to him."[32] It makes good sense to

---

[30] In *United States* v. *Cooper*, 397 F. Supp. 277 (D. Neb. 1975), the court followed precisely the analysis suggested here. It said:

> "It makes sense to me that no prejudice needs to be shown as a prerequisite to a new trial if overheard confidential communications between a defendant and his counsel or conversations of counsel about the defendant's case are within the knowledge of the prosecuting attorney at the time of the trial. The dangers of subtle use by the prosecutor of the information from the conversations, either evidentially or strategically, are obvious. On the other hand, when the prosecution knows nothing of the fact or contents of the conversations, danger to the defense or advantage to the prosecution is imperceptible, even by an agile imagination." *Id.* at 284.
>
> "My analysis of the foregoing cases leads to this: If a government informant (1) gains information (2) relating to a charge then pending or being investigated (3) from overhearing conversations by counsel expected to be confidential, and (4) the information is divulged before or during trial on that charge to the counsel handling the prosecution of that charge, then there has been a violation of the defendant's Sixth Amendment right to counsel and a new trial is necessary if conviction has followed the divulging." *Id.* at 285.

The court held that, on the facts of *Cooper*, there was "no evidence that any conversations overheard were between defense counsel or workers and any of the defendants now before the court and no evidence that any reporting to the prosecution was done." *Id.* at 283. *See also United States* v. *Crow Dog*, 532 F. 2d 1182, 1198 (5th Cir. 1976) (petition for certiorari filed).

[31] *Glasser* v. *United States*, 315 U.S. at 76.

[32] *United States ex rel. Cooper* v. *Denno*, 221 F. 2d 626, at 631 (Frank, J., concurring).

apply that rule to all situations where the external or uncontested facts establish that there was an opportunity for prejudice to have occurred (in the words of *Glasser* v. *United States, supra*: where prejudice could "conceivably" have occurred). If the courts were to demand a showing of actual prejudice under these circumstances, they would necessarily be affirming a certain — though undeterminable — number of convictions where prejudice actually occurred but where it could not be proved. Thus the courts have reasonably decided that the policies of the Constitution require them to err on the side of requiring a new trial in some cases where prejudice may not have occurred, rather than err on the side of affirming some convictions in cases where prejudice may well have occurred.

The rationale of this "salutary, prophylactic rule" would, of course, not be served were it applied to situations where the external or uncontested facts provide no conceivable opportunity for prejudice. Since this category contains no cases where actual prejudice might have occurred, a rule requiring automatic reversal would simply have the effect of requiring new trials in a large number of cases where no possibility of actual prejudice existed.

Thus, before invoking the rule dispensing with the requirement of showing actual prejudice, the courts ask a threshold question: did the external or uncontested facts provide any reasonable opportunity for prejudice to have occurred? In answering this question, the courts will not look into the contested details of the situation (*e.g.*, who said what to whom and when), but will look instead to the general factual setting (*e.g.*, did an unlawful intrusion occur; was there any subsequent communication between the intruders and the trial prosecutors). If the general factual setting was such that prejudice could have occurred, the court will look no further; it will reverse and remand for a new trial without requiring the defendant to shoulder the difficult burden of demonstrating specific prejudice.

In light of the stated rationale for the rule, it is clear that the paradigm case for its application is a situation where there

was unlawful interception and subsequent communication under circumstances where there was ample opportunity for prejudice to have occurred, but where the possibilities of *demonstrating* actual prejudice are slight, because of the Government's failure to keep adequate records.

The Ostrer case presents the paradigm situation for application of the rule, since it is conceded (1) that numerous legal strategy meetings between Ostrer and his attorney November were unlawfully overheard, and (2) that those who overheard their meetings subsequently met with the actual prosecutor at Ostrer's trial and communicated to him at least some information that was learned from the unlawful electronic surveillance. It is also conceded that no written or taped records were preserved of this meeting, though the Government concedes that Fine made a memorandum. Thus, the opportunity for prejudice was great; and the possibility of demonstrating actual prejudice was slight as the result of the Government's failure to preserve its records. Accordingly, the conviction should be reversed without the need for any further inquiry into demonstrable prejudice.

II. The Defendant, in Any Event, Proved Actual and Substantial Prejudice, Notwithstanding that his Effort to Prove his Case was Hampered by the Failure of the Government to Maintain and Preserve Critical Notes and Memoranda.

In its "pure" findings of fact, without the inferences and interpretations drawn therefrom, the District Court paints a picture of substantial communication of privileged attorney-client information passed by the District Attorney's office to the Federal prosecutor. It is only because the finder of fact speculates that McGuire did not use any of this information to advantage during the Belmont trial that the Court below denies the motion for a new trial.

As noted earlier, the Court below found that Fine communicated to McGuire his information that Ostrer and November were engaged in a plot to "blackmail" Aubrey Moss, a prospective Government witness in the Belmont case. He also told McGuire about the presence of an investigator named Jim

Lynch in the Ostrer defense camp. Finally, he gave McGuire some material to assist in cross-examining Ostrer in the event the latter took the stand in his own defense. In formulating the information he would give to McGuire, Fine had the benefit of listening to the wiretaps, reading the plant reports, and talking to the monitoring agents.[33]

Finally, of course, Fine heard in full the critical Ostrer-November conversation of November 21, 1972, which the Court below found to be a lawyer-client conversation relating to the Belmont case (App. 682).

It is not disputed that Moss — who had testified at the SEC hearing in the Belmont matter, who was thereafter called to testify before the grand jury that indicted Ostrer, who was kept under subpoena by McGuire after McGuire's meeting with Fine, and who was notified after the meeting that he need not show up at the start of the Belmont trial but was still under subpoena and on call — was not called to the stand by McGuire at the trial itself. And while the precise reasons for McGuire's failure to call Moss as a witness are in dispute, McGuire made sufficient admissions at the evidentiary hearing, and the Court below made sufficient findings, from which one must draw a conclusion that the communication by Fine to McGuire played a very perceptible role in McGuire's decision.

At the outset, it must be borne in mind that the Court below[34] never doubted that if it could be shown that Fine's statements to McGuire influenced to any degree McGuire's decision not to call Moss to the stand, a new trial would have to be granted. What is puzzling is why the motion was not granted.

In his first affidavit filed in opposition to the Defendant's request for an evidentiary hearing on his motion for a new trial, McGuire stated that at the time he met with Fine and

---

[33] As the Court below found, one listening to the tapes would have heard numerous trial-related topics discussed (App. 680-681).

[34] The Court noted at one point: "It is the contention of the movant that the Government obtained a benefit by receiving information wrongfully obtained, which information impelled the prosecutor to change his tactics to the extent of not putting Moss on as part of the Government's direct case. I think if you could really prove all of those things, you would be in really good shape on a Rule 33 motion." (App. 126.)

learned of the plot to "blackmail" Moss, he (McGuire) had "about decided" not to use Moss as a witness anyway (App. 27).[35] When Ostrer's counsel pointed out in a reply memorandum that having "about decided" not to call a witness is a bit like being somewhat pregnant, McGuire submitted a second affidavit claiming that the conversation with Fine merely "reinforced" his already existing "determination not to call Moss" (App. 32). Later, at the evidentiary hearing, McGuire testified that, by the time he received the information from Fine, he had already decided quite clearly that he would not use Moss, although, in obeisance to his earlier affidavits, he admitted that he had not ruled Moss out "mathematically" (App. 123). Interestingly enough, the Court below did *not* find as an unqualified fact that McGuire had determined before he met Fine not to call Moss. Rather, the Court found that "McGuire told Fine that he did not have to worry about an obstruction of justice, because it was not McGuire's *present* intention to call Moss as a witness, *at least*, not as part of the Government's *direct* case" (App. 694) (emphasis added). Thus, McGuire's pre-Fine decision not to call Moss, to the extent there was such a decision, was far from an absolute one. According to McGuire's own testimony, that decision could be changed, and McGuire might have called Moss, if something during the course of the trial warranted such a move (App. 32). He admitted on the stand that one motive for reaffirming after the Fine-McGuire meeting that Moss understood that he had to remain on call under subpoena was because "everybody who could possibly be considered a witness" was being subpoenaed (App. 416). Thus, as of the very eve of the commencement of the Belmont trial, and some time after the McGuire-Fine meeting, Moss was, in McGuire's thinking, still "possibly . . . considered a witness." Indeed, the Court below found that one reason McGuire "was willing to keep Moss under subpoena . . . [was] because he could not

be certain that some circumstances might not develop at trial making Moss' testimony significant."[36]

If indeed Moss was still a potential Government witness as the Belmont trial began, what effect, one must ask, did Fine's warning have on McGuire's strategy? This question is answered by McGuire himself. McGuire pointed out, correctly, that a good trial lawyer keeps his options open and maintains his flexibility as to strategy and tactics right up until the last minute. McGuire claimed that this was what he meant when he said that he had not entirely eliminated the possibility of calling Moss as a witness by the time he saw Fine. If something were to have happened at the trial to change his initial determination not to call Moss, he would have done so — absent the Fine information. But, he claims, nothing happened at trial to alter that determination (App. 395).

One would have to engage in the most subtle form of mind-reading and "Monday morning quarterbacking" to try to fathom by what balancing process a trial attorney weighs in mid-trial the decision whether or not his case requires that an additional witness be put on the stand. Clearly, the Court below was unable to find, and did not find, that McGuire was not or could not reasonably have been influenced by Fine's information, to some perceptible degree,

---

[36] The Court found that another reason McGuire had for keeping Moss under subpoena was Fine's fear that if suddenly Moss was released from subpoena, somehow Ostrer would figure out that Moss' release meant that the Government had obtained the cooperation and testimony of Michael Hellerman, billed by McGuire as the Government's surprise witness (App. 696). First of all, it is irrelevant whether McGuire had one reason or several reasons for wanting to keep Moss under subpoena. As long as one of the reasons was that McGuire was still considering Moss as a possible witness, it cannot be said that a weighing process was not still going on in McGuire's mind — a weighing process in which Fine's information played some perceptible role in McGuire's decision whether or not to call Moss. Besides, if Moss was as unimportant a witness as McGuire would have one think (App. 390), then why would one assume that his being released from subpoena would have been so significant as to tip off Ostrer's counsel that Hellerman was to be a surprise Government witness?

in his (McGuire's) ultimate decision not to use Moss.[37] As long as McGuire was flexible on the issue of Moss, he could not help but bear in mind the ominous import of Fine's warnings about Moss' skeletons — his susceptibility to "blackmail."

Recognizing the compelling and inevitable conclusion that McGuire did not and could not ignore entirely Fine's communication in his (McGuire's) calculations on whether or not to use Moss, the Court below found it necessary to move on to the next question of whether, assuming that McGuire's decision on Moss was motivated in part by Fine's communication, Ostrer was in any way actually prejudiced by McGuire's ultimate decision not to call Moss.[38]

The Court below concludes that even if McGuire had put Moss on the witness stand, it would not have opened up to Ostrer's counsel the opportunity to bolster Ostrer's defense and to score any effective points on cross-examination, as Ostrer vigorously claims. This problem is understood only in the context of the Government's theory and proof in the Belmont trial itself.

---

[37] There was, however, ample reason for McGuire to have put on more witnesses, including Moss, after the Government's star witness, one Michael Hellerman, the master mind of the Belmont swindle (as the Court below found at App. 697), was badly mauled by defense counsel on cross-examination. This doubtless accounted for the jury's extraordinarily long 2½ days of deliberations. The damage to Hellerman was enough to have caused Ostrer's counsel Maurice Edelbaum to advise Ostrer not to take the stand and risk exposure of his prior conviction for larceny to the jury. McGuire's decision not to use Moss was certainly due in part to Fine's "reinforcement" of McGuire's earlier inclination.

[38] It is difficult to understand why the Court below at this point went on to try to determine if McGuire's decision prejudiced Ostrer, since the Judge had earlier said that as long as McGuire was in some degree influenced, by Fine's information, not to call McGuire, then Ostrer would be entitled to a new trial. (See App. 124, where the Court stated: "I think that would be enough in most cases, and I don't think I could be called upon to go forward beyond that and say, well, even if he [McGuire] had blundered his way through and called Moss as a witness it wouldn't have made any difference in view of the extent of the proof or whatever else — I don't think that would be very relevant.")

It was the Government's position that the Belmont manipulation scheme required that the conspirators maintain possession, or at least effective control, over all of the outstanding 28,000 shares. Ostrer, according to Hellerman's testimony at the trial and the Government's theory, was responsible for either purchasing, or finding purchasers for and thereby controlling 14,000 shares at $15 per share, for a total investment of $210,000. Ostrer, so goes the theory, could not raise the money himself, so he borrowed $60,000 from a loanshark, borrowed $52,000 from Hellerman, purchased some shares himself, and, Hellerman further testified, "Ostrer had mentioned several people to whom he was attempting to sell a portion of his allocated shares" (App. 699-700). Aubrey Moss was such a person, as were one Lee Evins, and one Fred Flatow (App. 699). In fact, at the trial, Hellerman mentioned at least one other such person, one "Kaufman" (Trial Tr. at 814-816).

Thus, there were at least four persons whom Ostrer induced or persuaded to purchase part of his allotment of Belmont Franchising stock. Each of Moss, Flatow and Evins were committed to purchase 2,000 shares of Ostrer's allotment. There is no way of telling from Hellerman's trial testimony how many shares Kaufman might have been committed to, or for that matter any of the others, since Hellerman claims not to have been privy to Ostrer's arrangements. On cross-examination by Ostrer's chief trial counsel, Maurice Edelbaum, Hellerman admitted, with some obvious reluctance, that Ostrer had entered into agreements with some of his friends or associates who were to purchase Belmont shares, and with respect to those shares Ostrer guaranteed the purchasers against all losses, and Ostrer was to get some of the profits. Unfortunately, Edelbaum was unable to get very far in eliciting these and additional details of these 50-50 profit sharing arrangements between Ostrer and any number of persons, partly because Hellerman exhibited an ignorance[39] of

[39] Whether Hellerman's ignorance was feigned or real is difficult to determine. The Court below, in any event, found that Hellerman had only the most peripheral knowledge of Moss' dealings with Ostrer, and that "Hellerman did not know first-hand whether Moss had purchased a portion of Ostrer's shares, or on what terms" (App. 729, n. 14). Thus, any suggestion that Edelbaum could have gotten out of Hellerman what he could have gotten out of Moss is simply wrong.

the details. Equally important, however, was the fact that sometimes when Edelbaum asked a question in this area, Hellerman's responses were loaded with highly prejudicial material that made further questioning hazardous. For example, Hellerman at one point entirely gratuitously volunteered the name "Hickey DiLorenzo," a reputed mobster, in the same breath as Ostrer's name.[40]

Edelbaum, who was found by the Court below to have testified truthfully and creditably (App. 707), stated that while he did not himself want to call Moss as a defense witness, he did want an opportunity to cross-examine Moss when the Government used him (App. 474-475). He testified that the reason he could not put Moss on the stand was that he did not trust Moss, and would never call a witness with respect to whom he did not have access to minutes of prior grand jury testimony and other § 3500 material.[41] Edelbaum had the same reason for not calling Evins (App. 701), and Flatow was dead (App. 700).[42]

Thus, the Court below recognized that Edelbaum, whom the Court described as a "high-principled" and "truthful" man (App. 707) and "renowned advocate" (App. 710), truly did want to get Moss on the witness stand, but for good reason refused to call him as a *defense* witness, and hence waited for an opportunity to cross-examine Moss the *Government* witness. Edelbaum so testified (App. 474-475), and the Court below deemed Edelbaum's tactical decision to be "the wise professional judgment attained by more than forty-five years of active and successful criminal defense experience" (App. 710).

In view of the fact that the Court below seems to have agreed with Edelbaum's trial tactics and with his decision not

---

[40] The entire portion of the transcript dealing with the cross-examination of Hellerman is worth noting, and is reproduced in Addendum II.

[41] The Court below found that this was the reason Edelbaum refused to call Moss as a defense witness (App. 701).

[42] There is no indication in the record as to why Kaufman was not available.

to call Moss as a defense witness but instead to wait — eagerly — for him to be called as a Government witness, it seems strange to find the Court below voicing an expectation that Moss' testimony on cross-examination "would not necessarily have been exculpatory of Ostrer" (App. 711), thus apparently disagreeing with "this renowned advocate's" (Edelbaum) intense desire to cross-examine Moss. The reason the Court below takes this apparently contradictory position is because it completely misunderstands the strategic importance of the defense's having Moss as a *Government* and not as a *defense* witness.

Edelbaum testified that if he had Moss on the stand as a *Government* witness, he would "of course" have introduced into evidence testimony concerning, and even a copy of, the written agreement that Ostrer had with Moss, pursuant to which Ostrer guaranteed all Moss' losses and was to share 50-50 in the profits (App. 480). Since Hellerman had testified that he (Hellerman) had a deal whereby he guaranteed Ostrer's losses *and was to share 50-50 in Ostrer's profits*, Edelbaum (App. 486) and November (App. 535) felt that Moss' testimony concerning the existence of Ostrer's deal with Moss and similar deals with other investors *would fatally contradict Hellerman's testimony that Ostrer was Hellerman's partner, and hence co-conspirator, since Ostrer would have had to be crazy to enter a deal where half the profits went to Hellerman, and the other half went to Ostrer's friends who were investing.*

The Court below attempts to resolve this problem by concluding that Moss' testimony concerning the 50-50 deal between him and Ostrer (and between others and Ostrer) would not "necessarily" have contradicted Hellerman's testimony, since the jury *could* have believed that Ostrer was willing to give up all his profit (half to Hellerman, and half to the various investors) on, perhaps, 6,000 shares (2,000 to each of Moss, Evins and Flatow), in order to be able to realize a profit on his remaining 8,000 shares.

However, even the finder of fact was not so certain that the wish to have Moss on cross-examination was a flaw in Edelbaum's logic and strategy, for the Court concluded only that

"although Moss' testimony certainly would have been relevant, it *may* not have exculpated Ostrer in the minds of the jurors. Rather, it *might* have shown guilt" (App. 712) (emphasis supplied). The Court thus recognized the impossibility of putting oneself into the minds of the jurors and deciding how *they* would have reacted to a relevant but perhaps (in the Court's view) ambiguous piece of evidence.

However, Moss' evidence would not have been quite so ambiguous. After all, Hellerman himself alluded to a possible *fourth* party with whom Ostrer might have had a 50-50 contract (Trial Tr. at 815). If four such contracts existed, Ostrer would have been losing all profit on not just 6,000 shares, but rather on 8,000 shares.[43] And it is not known whether Moss might have testified to even more such "deals," such that the number of shares on which Ostrer was still participating might have dwindled to nothing or next to nothing. Indeed, it is impossible to tell at what point the jurors might have concluded that Hellerman must have been lying about his 50-50 partnership with Ostrer, since Ostrer could not be expected to have knowingly involved himself in an illegal stock manipulation without a chance for at least a substantial and worthwhile profit. It is clear, however, even from the District Court's own reasoning, that *the higher the number of shares from Ostrer's allotment that could be shown to be subject to profit-sharing between Ostrer and his investor friends, the less credible becomes Hellerman's claim that he (Hellerman) was a 50-50 partner of Ostrer with respect to Ostrer's entire allotment. The jury that heard the Belmont case was unaware of this critical arithemtic, because it did not have before it Moss' testimony as to these 50-50 deals.* This would have been the most critical evidence in the case, for it would have destroyed the centerpiece of Hellerman's testimony — the claim that he (Hellerman), an admitted Belmont swindler, was Ostrer's partner and hence co-conspirator.

The Court's theory that Moss' testimony might have shown Ostrer's guilt rather than his innocence (App. 712) is also contradicted by McGuire's claimed decision not to use Moss

[43] The fourth party, Kaufman, may of course have held more than 2,000 shares — Hellerman was not certain (Trial Tr. at 815).

because Moss' testimony was not sufficiently inculpatory toward Ostrer, since Moss persisted in maintaining that Ostrer never told him that the stock was being manipulated (App. 394, 402-404). We are thus faced with the *prosecutor's* claimed belief that Moss *would not* inculpate Ostrer, and the *District Court's* speculation that Moss *might have inculpated* Ostrer.[44] Indeed, the very disagreement between the Court below, and the opinions of two advocates (McGuire and Edelbaum) that the Court indicated great respect for, shows just how dangerous it is to venture an opinion as to how Moss' testimony might have affected the jury. All we know is that Edelbaum, McGuire and November — all of whom were at the trial — held a substantial belief that Moss might exculpate rather than inculpate Ostrer, whereas Judge Brieant — who was not at the trial — had some doubts about that.

The Court below then goes on to note that Ostrer was not prejudiced by McGuire's decision not to call Moss, because (a) the defense could have called Moss as a witness, or (b) the defense could have requested the Court to call Moss as the Court's witness, or (c) the defense could have sought to introduce the 50-50 contracts themselves by authenticating them without either Ostrer or the investors testifying (App. 710; 729-730 at n. 15, 16).

The Judge's reasoning is difficult to understand in light of his clear indications during the hearing that he understood that it would have been foolish for Edelbaum to call a witness whom he suspected of harboring hostility against the defendant, who testified twice previously under oath, and for whom Edelbaum did not have access to § 3500 material (App. 494, 496-497). In fact, in his opinion, Judge Brieant recognizes why Edelbaum could not call Moss.[45]

---

[44] The picture is further clouded by the issue of why McGuire maintained Moss under subpoena as a "possible" witness right through to the end of the trial, even though he believed that Moss had perjured himself before the SEC, and before the Grand Jury, and would perjure himself again before the petit jury (App. 402-404).

[45] See App. 7-10; 729, n. 15 of the Court's opinion, where it is noted that under the then-existing Federal practice, one had to "vouch" for the credibility of a witness that one called.

Nor is it reasonable to conclude that Edelbaum could have asked the Court to call Moss. As the Court below recognized, it was critical for Edelbaum to have the witness' § 3500 material before examining him, and there is no indication that Edelbaum or anyone else believed that he could get access to such material if Moss were a Court-called witness, rather than a Government witness.[46] Indeed, the Court below recognized how rare it was to invoke this theoretical option (App. 729, n. 15; App. 495-497).

The Court below then suggests that the document might instead have been authenticated by a handwriting expert (App. 702; 729-730, n. 16). However, this assumes several critical facts not in the record. It assumes that *all* of the contracts existed and were available, notwithstanding the death of at least one investor (Flatow) and the doubtful status of another (Kaufman). Furthermore, it assumes the availability of experts familiar with the handwritings of *all* of the investors.

However, the District Court's suggestions as to how Edelbaum might have remedied McGuire's failure to call Moss are rather beside the point, for the very reason that it would not even have occurred to Edelbaum to do so, even if it were not as risky a step as it in fact was, since Edelbaum knew that McGuire had placed and kept Moss under Government subpoena. After all, McGuire claimed that he did this as a cover, *and in fact the cover worked as expected,* for Edelbaum was fooled into thinking that Moss would be a Government witness. Since McGuire claims that he kept Moss under sub-

[46] Indeed, extensive research has not uncovered any authority for the proposition that defense counsel is entitled to § 3500 material before examining a Court-called witness. Edelbaum believed that he would not have been entitled to such material (App. 495). Furthermore, Edelbaum noted another reason for not wanting Moss called as a Court witness — the fact that the Court's imprimatur would then be placed on a witness who might testify adversely to Ostrer (App. 496). Judge Brieant heartily agreed that this was a serious problem and that "any capable experienced counsel will think twice before he puts the Court in a position of calling a witness whose credibility he doubts and I gather from his testimony that he [Edelbaum] doubts the veracity of Mr. Moss" (App. 497). Needless to say, after such a colloquy, Ostrer is surprised to be faced by the District Court's suggestion that his counsel should have asked the Court to call Moss as its witness.

poena at least in part at John Fine's request (App. 696) in order to fool the defense camp to protect the secrecy of Fine's investigation,[47] then it is clear that McGuire's keeping Moss under subpoena and thereby fooling Edelbaum into thinking that Moss would be a Government witness, was a strategy decision on McGuire's part that *is directly attributable to Fine's having gleaned information from the illegal wiretap.* Taking the Government's claims and the District Court's findings at face value, Fine thus admittedly influenced a major strategy decision of McGuire, which in turn influenced Edelbaum in his decision whether to seek to have Moss take the witness stand in one capacity or another.

Edelbaum's contemplated use of Moss as a vehicle for getting into evidence testimony and documents relating to Ostrer's 50-50 deals with his associates was simply one side of the coin, of course. Moss had a negative side, for he was mad at Ostrer and could be depended upon to give some testimony adverse to Ostrer.[48] But the defense was prepared for this, since Susan Gold was waiting in the wings to contradict Moss insofar as his testimony would be adverse to Ostrer.

The Court below entirely misperceives and does not give sufficient credit to Edelbaum's plan, and to November's less sophisticated but essentially similar plan, for using Gold to prevent Moss from doing damage to Ostrer. The Court focuses on November's thought that Gold could testify about Moss' scandalous sex life and thereby discredit him entirely. Having set up this straw man, the Court then knocks it down by claiming that, under the then-existing rules of evidence, such evidence would not have been admissible (App. 684-686).

Even assuming, however, that November was wrong about this point of evidence, the Court below missed entirely the more important strategic consideration that was recognized by both November and Edelbaum, who felt that Gold was a

---

[47] "I wanted to keep the defense guessing" (App. 416).

[48] It was unlikely that he would lie about the 50-50 deal with Ostrer, since it was in writing. However, he evidently intended to claim that he was swindled by Ostrer. See November-Ostrer conversation, and Gold-Moss conversation, at Ex. 72 and 113, and discussed at pp. 8-11, *supra.*

potentially important witness to impeach Moss' credibility by testifying that Moss had earlier said things about Ostrer that were the polar opposites to what he was testifying to at trial.[49] It was this testimony by Gold that would serve to impeach Moss to the extent he testified against Ostrer, and this would certainly have been admissible under even the most restrictive view of the rules of evidence. Cf. *Davis* v. *Alaska*, 415 U.S. 308 (1974). The Court below completely missed this point, even while finding Edelbaum's testimony credible.

III. To the Extent that the Defendant Might be Seen as having Failed to Sustain his Burden of Proof, Major Fault for this Failure Must be Attributed to the Government's Failure to Provide, or the Loss of, Critical Notes and Memoranda.

Given the subtlety of the factual issues presented to the Defendant as he commenced the evidentiary hearing below, he was substantially and, if the lower Court's conclusion is to be accepted, fatally disadvantaged by the fact that, while the Government had tape recordings of all of his conversations,[50] the Defendant did not even have access to what should have been routine notes and memoranda in the Government's files.

It is not really open to dispute that the Fine-McGuire meeting of November 21, 1972, was a critical point in the case, since it constituted a major "chink in the wall." John Fine admitted that he had made a memorandum detailing what transpired at the meeting, yet, he explained, in response to Ostrer's demand for its production, that it disappeared from

[49] As the Court noted, Edelbaum disagreed with November's conclusion that testimony on Moss' sex life was admissible. But Edelbaum agreed that it would be important (a) to introduce through Moss evidence of the 50-50 contracts (App. 480) and (b) evidence, such as was possessed by Gold, that, for example, "Mr. Moss had made a prior statement indicating that he was 'cut to get Ostrer,'" and other evidence that Moss "had made other statements consistent with Mr. Ostrer's innocence" (App. 476). Edelbaum knew that Gold would testify that Moss told her that he merely made an investment with Ostrer and it went bad, but Ostrer was not "out to defraud him" (App. 477).

[50] Not only did the Government have the illegally obtained tapes, but it also had the Gold affidavit, which the State had seized in the admittedly illegal raid of Ostrer's office, and which the State had told Ostrer — falsely, it turns out — had been returned. (App. 510-518; Gov't. Ex. BB.)

the case file, where Fine would have deposited it before leaving the District Attorney's office (App. 299-303).

The disappearance of this potentially critical memorandum is curious, especially in view of the fact that state court proceedings against Ostrer continued until April 3, 1975 (when the District Attorney moved to dismiss the indictment). At that time, it was clear that Ostrer's motion for a new trial in the Belmont case was being pressed vigorously, and in fact a formal motion for the production of all tapes, logs, memoranda and other documents relating to the monitored conversations had been filed in January 1975 (App. 18, 33).[51] In fact, on April 7, 1975, Ostrer's counsel wrote to the United States Attorney expressing keen interest in materials from the District Attorney's office and demanding that the United States Attorney take immediate steps to preserve some of these materials. (See letter of Harvey A. Silverglate, Addendum III.)

Under these circumstances, the Government should be taxed with a strong inference that the missing memorandum contains information favorable to the defendant — *i.e.*, further indications that more extensive information concerning Ostrer's Federal trial was relayed from Fine to McGuire.[52]

Nor can Fine's loss of his memorandum be attributed solely to the fault of *state* authorities. Fine attributed his failure to

---

[51] That Federal motion was renewed by Ostrer several days after the dismissal of the state indictment — on the very day on which the District Attorney's office was, pursuant to a discovery order by the Supreme Court for New York County, to have turned those tapes over to Ostrer's counsel.

[52] See *Cecil Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F. Supp. 819, 859 (M.D. Tenn. 1974); *Galella* v. *Onassis*, 353 F. Supp. 196, 205 (S.D. N.Y. 1971), affirmed in part, reversed in part, 487 F. 2d 986 (2d Cir. 1973); *The Motor Launch No. 12*, 65 F. Supp. 252, 253 (E.D. Pa. 1946); *Dow Chemical Co.* v. *S.S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S.D. N.Y. 1969); *Wenninger* v. *United States*, 234 F. Supp. 499, 508 (D. Del. 1964), affirmed, 352 F. 2d 523 (3d Cir. 1965); *Ford* v. *United States*, 210 F. 2d 313, 317 (5th Cir. 1954), and cases cited. *Cf. Vick* v. *Texas Employment Commission*, 514 F. 2d 734, 737 (5th Cir. 1975); *Matter of Grace Line, Inc.* v. *S.S. Santa Leonor*, 397 F. Supp. 1258, 1269 (S.D. N.Y. 1973), *United States* v. *Pollack*, 19 Cr. L. 2421 (D. Mass. 8/6/76).

find his notes, at least in part, to the fact that, shortly before the evidentiary hearing in this case, the files of the District Attorney were relocated, and things got misplaced in the move (App. 301-303). If that is true, it means that had Ostrer earlier known of the communications by Fine to McGuire of privileged information, he would have sooner filed his motion for a new trial and for an evidentiary hearing. He would thus have sought and, presumably, obtained Fine's notes prior to the move. A major reason why Ostrer did not move faster was because McGuire, who now admits to having learned of the wiretap at his April 18, 1973, meeting with Fine, did not on his own communicate to Ostrer's counsel or to the District Court that he had just learned that he had, prior to the Belmont trial, been given information by a man who had listened in on bugged attorney-client conversations. McGuire's deliberate suppression of this information for nearly two years was inexcusable. See A.B.A., the Prosecution Function and the Defense Function.[53]

Equally interesting was McGuire's claim that he took no notes of his interview with Moss. He justified this inaction by claiming that Moss was neither a defendant, nor a putative defendant, nor "an important witness" at the time of the interview (App. 398). In response to the District Court's question as to whether McGuire had an interview sheet on which it was shown that he warned Moss of his rights, McGuire said that he did not do so, since he did not consider Moss a putative

---

[53] Fine's memorandum was not the only missing piece of potentially important evidence. Sylvio Mollo of the United States Attorney's office, McGuire's immediate superior, testified that he looked for his diary to see if there were any notes concerning his telephone conversation with Alfred Scotti of the District Attorney's office, but he could not find it, since the United States Attorney's office, too, had recently moved, causing the loss of his diary. This piece of evidence also would have been preserved had McGuire reported the meeting with Fine and the wiretap (App. 335). And Scotti, who testified that he made some entries in his diary, had looked at his diary and saw that he noted no more than that he called Mollo and arranged a meeting for John Fine (App. 356).

defendant (App. 398).[54] McGuire's failure to take or keep notes at certain crucial junctures is problematical, especially in view of the extensive notes he took at his post-trial April, 1973, meeting with Fine (Ex. 170-171).

This loss of notes and diaries is critical, for the Defendant, unlike the Government in this case, has not had the privilege of listening to conversations in the prosecutors' offices and rummaging through their files pursuant to an illegal search warrant. It is a particularly serious disadvantage in a case such as this, where the factual issues are ever so subtle.

For example, as the Court below found, there was a lot of bugged conversation concerning the question whether or not Ostrer should take the stand, and concerning what advice his attorneys were giving him on that critical question (App. 680). The Court below found no specific evidence, however, to justify the Defendant's suspicion that Fine might have managed to transmit to McGuire some inkling that Ostrer had decided — as the wiretap tapes show[55] — not to take the witness stand. There are, of course, many ways and many levels on which such a crucial piece of information could have been communicated by Fine without McGuire's even having recognized that he was being given the fruits of Sixth Amendment incursions. More specifically, McGuire asked Fine for background information on Ostrer for help in cross-examination in the event Ostrer took the stand. It would have been a simple matter for Fine to have subtly indicated to McGuire that he (McGuire) would be better off spending less time preparing to cross-examine Ostrer. This might, in fact, partly explain why Fine, as found by the Court below, gave McGuire so little assistance in this area (App. 693). The Court below further found that at the McGuire-Fine meeting, "Fine encouraged

---

[54] If, however, McGuire in fact did not believe Moss, then he certainly must have believed that Moss perjured himself before the SEC and the Grand Jury and that he was about to lie to a Federal officer (*i.e.*, McGuire).

[55] On November 8 or 9, Julius November said in a bugged conversation that Ostrer would not take the stand. (Tape #3818, Gov't label #A-1). See also App. 632-633.

McGuire not to do anything differently in the preparation of his case" (App. 695). Certainly it is impossible, on the basis of Fine's mere recollections, without his missing contemporaneous notes, to figure out precisely what Fine thought McGuire would do as a result of that advice. It is, further, impossible to determine whether or not Fine decided that McGuire was following the "correct" course in his Belmont trial preparation as a result of knowledge about the case and about Ostrer gleaned from hours of listening to privileged and other private conversations.[56]

Indeed, it was not unanticipated that Ostrer's presentation at his new trial motion hearing would depend upon circumstantial evidence. The Court recognized this at a conference held some weeks before the hearing began:

> "I am going to get [at the hearing testimony from] a prosecutor who is going to come in and tell me, absolutely not, he was never told anything, and probably his counterpart from the state is going to come in and say, absolutely, I told him nothing, and unless you [defense counsel] can establish it by circumstantial evidence from the tapes to the trial, unless you can put together a chain of proof, there is no way in which such a connection can be shown." (App. 119.)

The Court went on to further delineate the issue and counsel's task:

> "The ultimate issue is going to depend, in my view, based on what little I know about it, on a chain of circumstantial proof." (App. 120.)

---

[56] It is no less true that Fine's telling McGuire that Moss was a potential victim of "blackmail" was an off-handed way of Fine' communicating to McGuire the bottom line after listening to the Ostrer-November conversation — that Moss was too flawed a witness for the Government to safely call. For a lawyer, there can be very subtle ways of communicating a lot of information in a very few words indeed.

It is impossible to overemphasize the serious disability under which Ostrer has labored in presenting his evidence of taint. In addition to having to draw his evidence out of adverse Government witnesses' testimony, he has had to extract what documents he could from "adverse" files. While it is extremely difficult to pull admissions out of a clever witness, written documents leave a loud and clear trail all their own. This Court has been mindful of these burdens as, for example, when a similar situation arose and a defendant made efforts to prove Fourth Amendment taint, but was stymied because the tapes of the recorded conversations had been routinely destroyed. The Court stated that:

> "[t]he significance of the destruction of this evidence cannot be understated in this case. To compel a party who objects to the use of evidence obtained as a result of unlawful wiretapping to go forward with a showing of taint, Alderman v. United States, *supra*, 394 U.S. at 183, 89 S. Ct. 961, and then to withhold from him the means or tools to meet that burden, is to create an absurdity in the law. The problem is particularly acute in this situation where no apparent reason for the destruction of tapes suggests itself, nor has one been suggested by the government."

United States v. *Huss*, 482 F. 2d 38, 46-48 (2d Cir. 1973).[57]

[57] See also *United States* v. *Pollack*, 19 Cr. L. 2421 (D. Mass. 1976), where an indictment was dismissed because of the destruction of the handwritten notes that an agent claimed were destroyed once the notes were typed.

Conclusion.

For the foregoing reasons, the District Court's denial of the motion for a new trial should be reversed, and the motion should be granted.

Respectfully submitted,

ALAN DERSHOWITZ,
Harvard Law School,
Faculty Office Building,
Cambridge, Massachusetts 02138.
(617) 495-4617

HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO
& GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.
(617) 723-2624

Addendum I.

Chronology.

To appreciate the importance and effect of some of the matters brought out at the evidentiary hearing, the Court may find the following chronology usefu

October 24, 1972 — Ostrer's office telephone is tapped, and his office bugged. Ostrer is, at this time, under Federal indictment in the Belmont case.

November 21, 1972 — Ostrer and his long-time attorney Julius November discuss, at Ostrer's office, the Susan Gold affidavit and the manner in which Gold, her affidavit, and her possible testimony might be used to Ostrer's advantage in the event Aubrey Moss is a Government witness at the trial.

November 21, 1972 — On this same day, Assistant United States Attorney Harold McGuire interviews Moss at McGuire's office.

November 22, 1972 — Ostrer discusses on the telephone Moss' grudge against him.

Between November 24 and December 5, 1972 — Ostrer mentions on the telephone that "Jim Lynch" is his investigator and will be interviewing all the witnesses on the witness list for the Belmont trial.

November 30, 1972 — At McGuire's behest, a subpoena is issued to secure Moss' appearance as a witness at the Belmont trial.

November 30, 1972 — The wiretaps and bugs reveal conversations whereby Ostrer and Susan Gold evidence an intention *not* to see Moss or have anything to do with him. In a conversation betw[illegible]n Gold and Moss, no mention is made of the Gold affidavit.

December 21, 1972 — Sylvio Mollo of the United States Attorney's office and Alfred J. Scotti of the District Attorney's office speak with each other by telephone. Scotti tells Mollo the "import" of the bugged November 21st conversation; the arrange a meeting between their respective subordinate

Harold F. McGuire (the Belmont prosecutor) and John Fine. McGuire phones to arrange a meeting with Fine.

December 22, 1972 — A meeting is held at Fine's office among Assistant District A ey Fine, Assistant United States Attorney McGuire, Det. John J. O'Rourke, Det. Dennis P. Brennan, and possibly others walking in and out of Fine's office. Fine communicates to McGuire information gleaned from the Ostrer taps and bug.

December 22, 1972 — Fine seeks to amend, and succeeds in amending, the Ostrer wiretap and eavesdrop warrant to include Julius November, Esq., as a target, all the while knowing that November is an attorney.

December 27, 1972 — Moss writes to McGuire to confirm his recent telephone conversation with Meyer Goldman, McGuire's assistant; it has been agreed that Moss need not attend the opening of the Belmont trial, but could and would remain on call.

December 29, 1972 — McGuire receives a telephone call from Fine, with the latter inquiring as to whether or not Moss has been subpoenaed for the Belmont trial. (Because of the late discovery of this diary entry, McGuire was not examined as to what else was discussed or mentioned during this telephone conversation.)

January 4, 1973 — Jury is sworn in the Belmont trial.

January 27, 1973 — After two and a half days of deliberation, the Jury returns a guilty verdict against Ostrer.

February 20, 1973 — Bugging operation ceases.

February 21, 1973 — Ostrer's office is raided by Fine's squad. During the unlawful search, a copy of the Susan Gold affidavit is seized.

April 18, 1973 — A meeting is held between McGuire and Fine and certain others, at which Fine gives McGuire a fuller briefing of the existence of and information gleaned from the Ostrer bugging. Fine urges his interpretation that a prosecutable obstruction of justice has occurred.

Addendum II.

EXCERPT FROM TRIAL TRANSCRIPT, PAGES 814-816.

(Mr. Edelbaum is cross-examining Hellerman)

Q And you do know that Mr. Ostrer, not having the money, interested some friends of his to advance the money and buy it as a joint venture with Mr. Ostrer guaranteeing them against losses, isn't that right?

MR. MCGUIRE: Objection as to form.

THE COURT: Sustained.

Q Did he tell you that?

MR. MCGUIRE: Ojection to the form.

THE COURT: Sustained.

Q Did you know — question withdrawn. You told on direct examination about Fred Flatteu [*sic*, should be Flatow]?

A Yes.

Q What do you know about Fred Flatteu and Mr. Ostrer in connection with Belmont?

A I was sitting in a lawyer's office, Sam Weissman, who was a friend of the Flatteus and I know that Mr. Flatteu dialed because Mr. Weissman got a call from somebody in the family that they were having a problem collecting the money from Mr. Ostrer and they didn't know how to settle the estate that Mr. Ostrer had showed or made a deal with Mr. Flatteu.

Q How do you know about Lee Evans [*sic*, should be Evins]?

A I don't know how many shares or if the transaction went through. Mr. Ostrer mentioned Lee Evans to me, he mentioned Harry Morse [*sic*, should be Moss] to me, he mentioned a man with a K, a Kaufman or something like that, but I don't know how many shares he actually sold each one, if in fact he did sell them, if he got proceeds from them or what. The only one I know is I heard the conversation of Sam Weissman with someone in the Flatteu family.

Q Very well. Tell me this. You say you guaranteed Mr. Ostrer's loss?

A Yes, sir.

Q And you were to get 50 per cent of the profits?

A Yes, sir.

Q And do you know — do you know that in the transactions with Evans, with Flatteu and Mr. Morse, Mr. Ostrer had made written agreements with respect to him sharing 50 per cent of the profits with Mr. Morse —

MR. MCGUIRE: I object to the question in this form.

THE COURT: Objection sustained.

MR. MCGUIRE: It is a speech, not a question.

THE COURT: I am having some difficulty understanding the question myself.

MR. EDELBAUM: All right, your Honor, I will try to make it plainer. I am sorry.

Q Do you know that Mr. Ostrer entered into an arrangement with a Mr. Lee Evans whereby Mr. Evans advanced the money for the purchase of the stock and Mr. Ostrer was to guarantee the losses and only share in the profits, do you know that?

A Mr. Ostrer and Mr. DiLorenzo told me —

Q Mr. DiLorenzo?

A Yes, told me.

THE COURT: What is your answer?

THE WITNESS: Mr. Ostrer and Hickey DiLorenzo told me Mr. Ostrer did this.

Q And this was after he had lost all the money, not before, isn't that right?

A I don't understand the question.

Q You were told this after the stock fell out of bed, as they say, isn't that right?

A No. The night we made the deal. I didn't know which people or what kind of pressure that Louis was under to give back —

Addendum III.

Silverglate Shapiro & Gertner
ATTORNEYS AT LAW

Harvey A. Silverglate
Thomas G. Shapiro
Nancy Gertner
Ann Lambert Greenblatt

217 Lewis Wharf
Boston, Massachusetts
02110
phone (617) 723-2024

April 7, 1975

Lawrence Pedowitz, Esquire
Assistant United States Attorney
United States Attorney's Office
Foley Square
New York, New York 10007

Re: United States vs. Louis Ostrer, No. 71 Cr. 558 DNE

Dear Sir:

As you may know, on or about April 4, 1975, the Hon. Burton Roberts, Justice of the Supreme Court of New York, New York County, dismissed a pending state indictment against my client, Louis Ostrer. While I was not counsel to Mr. Ostrer in that case, I am informed that the District Attorney for New York County had moved for the dismissal of the indictment, purportedly because of some question as to the legality of the wiretap of Mr. Ostrer's premises.

As a result of this dismissal, the defendant and his counsel will not have the opportunity to review the wiretap tapes and transcripts in the context of the aforesaid state prosecution. Judge Roberts had earlier granted Mr. Ostrer's discovery motion which would have given him access to the wiretap tapes ten days prior to trial. The indictment was dismissed earlier than ten days prior to trial.

My co-counsel Prof. Alan Dershowitz and I, as well as Mr. Ostrer, are most concerned now with the safety and security of the tapes of the wiretaps of Mr. Ostrer's premises. Now that they are no longer relevant to any pending state prosecution against Mr. Ostrer, we fear that they will be destroyed. Any such destruction would be a severe blow to our client's rights. It is our firm intention to eventually gain access to these tapes, either in connection with our discovery motion currently pending before Chief Judge Edelstein in the instant Federal case, or in connection with any hearing that we might have on our motion for a new trial, or at a new trial, or in the context of an independent civil action which we plan to file.

In view of the fact that the state courts now have a minimal interest in these tapes and the Federal Court has a very substantial interest in them, we anticipate that you will take all steps necessary in order to assure the preservation and security of the tapes themselves. In fact, we request that you take all such steps as are necessary to preserve them, even if it means having custody of the tapes transferred temporarily into Federal custody.

Please confirm promptly with either myself or Prof. Dershowitz your intention to protect the physical security of these tapes. In the absence of such assurances, we will be forced to seek relief from the Court.

I anticipate receiving tomorrow copies of the official papers in the state case relating to events described in this letter, and I will then immediately prepare a full report for Chief Judge Edelstein, a copy of which I will furnish you.

Finally, I would appreciate learning from you whether or not your office had any role in or knowledge of the decision whereby the District Attorney of New York County moved to have the Ostrer indictment dismissed.

Very truly yours,

HARVEY A. SILVERGLATE

HAS: ps
VIA AIR MAIL, SPECIAL DELIVERY
CERTIFIED MAIL — RETURN RECEIPT REQUESTED
cc: Hon. David N. Edelstein
Clerk, U.S. District Court, S.D.N.Y.
Prof. Alan Dershowitz

BATEMAN & SLADE, INC.
PROFESSIONALS ... SERVING THE LEGAL PROFESSION
15 SCHOOL STREET
BOSTON, MASSACHUSETTS 02108

(617) 742-0620

GEORGE D. BATEMAN
MATILDA S. DEL MEDICO
JOHN A. MURPHY
JOHN J. STANTON, JR.
LAURA J. GRAF
MARGARET A. BELL

FRANCIS W. COZZA
DIANE M. MURRAY
ANITA McCARTHY
CHRIS W. MacDONNELL
WILTON J. THERIOT
ARTHUR ROHNER

CERTIFICATE OF SERVICE.

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Date: September 13, 1976

Dear sir,

Herewith are 25 copies of the brief and 10 copies of the appendix (in three volumes) for:

Defendant-Appellant

No. 76-1282

UNITED STATES OF AMERICA

v.

LOUIS C. OSTRER

We certify that we have served 2 copies of the brief and appendix upon each other party separately represented, by hand, addressed as follows:

Laurence B. Pedowitz, Esq., Assistant United States Attorney, Office of the U.S. Attorney, One St. Andrew's Plaza, New York, New York 10007

Signed under the penalties of perjury:

George D. Bateman

BATEMAN & SLADE, INC.

BATEMAN & SLADE, INC.

Then personally appeared before me the above named George D. Bateman, of Bateman & Slade, Inc., and made oath that the foregoing is true.

Francis W. Cozza

Notary Public
My Commission expires:
June 18, 1983